SUPREME COURT, U.S.
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No. 94-543

In The

Supreme Court of the United States

October Term, 1994

JOSEPH G. DoPADRE

Petitioner,

vs.

ANNA G. DoPADRE

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES A. IRWIN
ELLEDGE & IRWIN, P.C.
333 West Wilcox Drive, Suite 205
Sierra Vista, Arizona 85635
(602) 458-0122
Attorney of Record for Respondent Anna G. DoPadre

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER PETITIONER HAS RAISED TO THE SUPREME COURT OF ARIZONA AND ITS LOWER COURTS THE FEDERAL QUESTION OF FULL FAITH AND CREDIT WHICH HE NOW PRESENTS TO THIS COURT

II

WHETHER A UNITED STATES BANKRUPTCY COURT'S RULING REGARDING DISCHARGEABILITY OF A DEBT RESTRICTS THE ARIZONA COURT'S ABILITY TO EQUITABLY DIVIDE RETIREMENT BENEFITS PURSUANT TO ARIZONA LAW

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JOSEPH G. DoPADRE

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On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RESPONDENT RESPECTFULLY PRAYS THAT THE PETITION FOR WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE ARIZONA SUPREME COURT, FILED JUNE 24, 1994 BE DENIED

REFERENCE TO REPORTS

DoPadre and DoPadre, No. DR-5184, Third Amended Decree of Dissolution of Marriage Nunc Pro Tunc, dated June 28, 1993, James L. Riley, Judge of the Superior Court of the State of Arizona in and for Cochise County

DoPadre v. DoPadre, 2 CA-CV93-0220, Dept A MEMORANDUM DECISION OF THE COURT OF APPEALS, STATE OF ARIZONA, DIVISION TWO

DoPadre vs. DoPadre, CV-94-0102-PR, MINUTE ENTRY ORDER OF THE SUPREME COURT OF THE STATE OF ARIZONA, dated June 24, 1994

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

STATUTES

10 U.S.C. SEC. 1408 (UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT) (SEE APPENDIX FOR COMPLETE TEXT OF SECTIONS (a) THROUGH (c))

ARIZONA REVISED STATUTES, SEC. 25-327(A)

MODIFICATION AND TERMINATION OF PROVISIONS FOR MAINTENANCE, SUPPORT AND PROPERTY DISPOSITION.

A. Except as otherwise provided in subsection F of Section 25-317, the provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to notice of the motion for modification to the opposing party and only upon a showing of changed circumstances which are substantial and continuing. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state. Modifications are effective on the first day of the month following the filing of the petition for modification unless the court, for good cause shown, orders the change to become effective at a later date.

ARIZONA RULES OF CIVIL PROCEDURE 60(c)(6), 16 ARIZONA REVISED STATUTES

MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC.

On motion and upon such terms as are just the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake; inadvertence; surprise; excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment or order was entered or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant served by publication as provided by Rule 59(j) or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief

from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

The facts of this case are somewhat set forth in the Findings of Facts and Conclusions of Law by the U.S. Bankruptcy Court For the Northern District of Texas, Lubbock Division and the Arizona Superior Court's Third Amended Decree of Dissolution, Nunc Pro Tunc, both of which are attached to the Appendix of the Petition filed herein. Because the Petitioner's factual recitation of the case is inaccurate, incomplete and misleading, Respondent has included her own Statement of the Case.

On July 13, 1987 after a trial in this matter, the Superior Court of the State of Arizona for Cochise County entered a Decree of Dissolution, which divided community assets and liabilities. Specifically, in paragraph 12, the Court awarded the two retirement plans of Petitioner (military and civil service) to him and created a $75,000.00 unsecured promissory note to be paid by Petitioner to his ex-spouse over a period of fifteen (15) years with interest at nine percent (9%) per year, to reflect Respondent's community interest in such retirement plans.

Respondent appealed the above decision alleging that it was improper to divide the retirement plans in the above manner for various reasons, including the fact that it left her without remedy in the event Petitioner later filed bankruptcy and discharged such unsecured note.

On January 26, 1988 the Arizona Court of Appeals ruled that no abuse of discretion had occurred as to the division of retirement; that the trial court was not required to take into account every *speculative* possibility (such as a future bankruptcy); and in any event Respondent's interest was "protected" by the trial court's requirement that Petitioner obtain a life insurance policy which "guaranteed" Respondent would receive the $75,000.00 sum. (Opinion at page A-6, Petition for Writ of Certiorari)

Petitioner had threatened Respondent all through the dissolution proceedings that it was his intent to file bankruptcy and discharge any money the Court ruled he owed her. Although he started making payments under the above promissory note in the amount of $760.00 per month, such payments stopped in February, 1989.

In October, 1988, Petitioner moved to Lubbock, Texas and on April 5, 1989 filed for protection under Chapter 7 of Title 11, U.S. Code (Bankruptcy).

Petitioner's bankruptcy petition reflected $72,066.97 of unsecured debt, $70,510.20 of which was owed to Respondent. Assets were reported at over $300,000.00. Petitioner reaffirmed all secured and unsecured debts including debts for his house, car, debt to Sears and a debt to W.A. Wilkins for a washer and dryer. The *only* debt that was discharged was the unsecured promissory note to Respondent.

Respondent travelled to Texas, retained counsel and filed an Adversary Proceeding challenging the dischargeability of the debt owed to her. The Bankruptcy Court found the claim to be dischargeable in bankruptcy.

Citing heavily from the Arizona Court of Appeals decision, the Bankruptcy Court found that out of fourteen factors to determine if the debt was actually spousal maintenance or property equalization, seven (7) factors indicated payment was spousal maintenance, six-(6) indicated property equalization and one (l) was unknown. Nonetheless, the Court ruled on March 19, 1990 that the debt was dischargeable. (Page A-29, Petition for Writ filed herein)

Respondent filed a Motion to Reconsider with the Bankruptcy Court which was denied on April 16, 1990.

Respondent is, and was, not employed due to back problems and is receiving social security payments in the approximate amount of $189.00 per month as her sole source of income.

Petitioner has in the past cancelled his life insurance policy in the amount of $75,000.00, which named Respondent as beneficiary but now claims to have replaced the insurance policy with a new policy. No proof of such policy's *current* status was ever provided to Respondent.

Petitioner refuses to name Respondent as a beneficiary under his Survivor Benefit Plan pursuant to the Uniform Services Former Spouses Protection Act, 10 U.S.C. Section 1408 and in fact has named his new spouse as such beneficiary.

On November 23, 1992 in the trial court, at the Order to Show Cause hearing of this matter, the following findings of facts were determined by such court:

a. Respondent did not file a Petition for Review to the Arizona Supreme Court from a decision of the Court

of Appeals, Division II in the original dissolution proceeding based on advice from her counsel as to the probability of success and the lack of funds available to her to pay legal fees and costs.

b. Petitioner moved to Texas in late 1988 and stopped making the required $760.70 monthly payment which was required by Paragraph 12 of the Decree of Dissolution after his February, 1989 payment. As of November, 1992 Petitioner's missed payments equal $34,231.50.

c. In April, 1989 Petitioner filed for bankruptcy in Texas, in which he "reaffirmed" or continued to pay all debts to every creditor, except Respondent, including his mortgage, his car loan, his debt to Sears for a refrigerator, and his debt to W.D. Wilkins for a washer and dryer. He also listed $301,093.00 worth of real and personal property, which he was allowed to keep through the bankruptcy. The only debt discharged was the $70,510.20 owed to Respondent.

d. After Respondent's attempts to challenge the dischargeability of the debt owed to her by Petitioner had failed, she was advised by her Texas attorney that an appeal of the issue of whether the money owed was a debt from the property division in the decree or spousal maintenance would be futile and expensive. She decided not to appeal the Bankruptcy Court's decision but rather conserve her funds to provide for her monthly living expenses.

e. Currently, Respondent receives $189.00 per month in social security and has monthly expenses of approximately $957.00.

f. Petitioner continues to receive 100% of both his Military and Civil Service retirements and has named his new spouse as the beneficiary under the Survivor Benefit Plan. He further claims that such designation is not changeable and that he will not voluntarily request Respondent be also designated under such plan.

g. That the discharge in bankruptcy received by Petitioner rendered meaningless the trial court's equitable division of community property and therefore provided an equitable reason to allow the reopening of the previous decree pursuant to Rule 60(c)(6) Arizona Rules of Civil Procedure and A.R.S. Section 25-327(A).

h. That the Respondent has been left in the "dire financial condition" as found by the Bankruptcy Court and without any ability to seek spousal maintenance from Petitioner.

i. That if these same circumstances had been presented at the time of the trial of this matter, Respondent would certainly have qualified for a substantial award of spousal maintenance.

j. The trial court concluded that Respondent's requested relief from the Decree of Dissolution does not upset the decisions previously made by the Arizona Court of Appeals nor the Bankruptcy Court; and Appellant's argument of *res judicata* does not apply.

k. Petitioner's unilateral and voluntary action in seeking to discharge his obligation to Respondent justifies the application of A.R.S. Section 25-327(A) and Rule 60(c)(6), Arizona Rules of Civil Procedure.

1. That Respondent had timely brought her motion to reopen/amend the decree based on the chronology of events, together with her financial ability to litigate such an action; and further that the Petitioner has suffered no legal prejudice from any delay in filing this action by Respondent, in fact he has benefitted financially in that months of payments which were ordered by the trial court were not made and which Respondent ***cannot*** recover under the discharged promissory note.

REASONS FOR DENYING WRIT

A. PETITIONER HAS FAILED TO RAISE FEDERAL QUESTION IN ARIZONA COURT PROCEEDINGS.

At no time, in any Arizona proceeding, did Petitioner raise the constitutional issue of Full Faith and Credit. No reference is made in the Petition herein specifying the stage in the proceeding, either in the trial court or appellate courts, at which the federal questions sought to be reviewed were raised by Petitioner as required by Rule 14(h), Rules of the U.S. Supreme Court. No record or summary thereof is provided nor specific references to the places in the record where such matter appears. Petitioner will be quick to point out that he did raise the issue of *res judicata*, but such legal principle on its own does not give rise to the requisite federal question which would give this Court jurisdiction to review the judgments of the Arizona Courts.

Petitioner's *res judicata* arguments were duly considered and rejected by the trial court, the Arizona Court of

Appeals and the Arizona Supreme Court for reasons set forth below, nonetheless, no federal issue has been presented to such courts by Petitioner.

B. THE TRIAL COURT WAS FREE TO MODIFY THE DIVISION OF PETITIONER'S RETIREMENT PROGRAMS IN LIGHT OF ITS PREVIOUS RULINGS AND OTHER COURTS' ORDERS INCLUDING THE BANKRUPTCY COURT'S RULING ON DISCHARGEABILITY.

Although Petitioner fails to cite 28 U.S.C. Section 1238, which implements U.S. Constitution Article 4 Section 1, it is clear that a state court must accord full faith and credit to a judgment of a federal court. *Stoll v. Gottlieb*, 305 U.S. 165, 170, 59 S.Ct. 134, 136-37, 83 L.Ed. 104, rehearing denied, 305 U.S. 675, 59 S.Ct. 250, 83 L.Ed. 437 (1938); No. 1 BJ. Moore, Federal Practice, Section 0.406 [1], at 266-67 n.7 (1991)

It is equally clear that the judgments of bankruptcy courts are preclusive only if there is: (1) a final judgment on the merits in an earlier action; (2) an *identity* of the cause of action in both the earlier and later suits; and (3) an identity of parties or privies in the two suits. *Kale v. Combines Ins. Co. of Am.*, 924 F.2d 1161, 1165 (1st Cir) cert. denied, ___ U.S. ___, 112 S.Ct. 69, 116, L.Ed.2d 44 (1991).

Additionally, it is well recognized that the bankruptcy court may not have exclusive jurisdiction of every issue. The state trial court often has subject matter jurisdiction over certain claims, especially after the bankruptcy case has been closed with no expressed retained jurisdiction. See *In re Talandis*, 95 B.R. 108, 109 (Bankr.

S.D. Iowa, 1989) (Bankruptcy court lacks jurisdiction to consider professional fee application after dismissal of Chapter 11 case). See also, *Woodley v. Myers Capital Corp.*, 67 Wash.App. 328, 835 P.2d 239, 243 (Wash.App. 1992).

In the present case, there is no argument that there was a final judgment on the merits from the U.S. Bankruptcy Court, Northern District of Texas, Lubbock Division which found that the unsecured $75,000.00 promissory note ordered by the Arizona Superior Court to be paid by Petitioner to Respondent was discharged. Nor is there any doubt as to the identity of the parties involved in obtaining such judgment, however, there is substantial issue as to whether the Arizona court's later modification of a decree of dissolution pursuant to Arizona law is the identity of cause which Petitioner claims.

With "tongue-in-cheek" Petitioner alludes to the fact that Respondent should have made her equity interest in Petitioner's retirement known to the U.S. Bankruptcy Court in Texas, knowing full well that such court would have *no* authority to *modify* an Arizona dissolution decree and the community property rights set forth therein.

The fact of the matter is simply; the Bankruptcy Court was called upon to decide a rather narrow issue, was the $75,000.00 unsecured promissory note ordered by the trial court, in the nature of spousal maintenance (and therefore not dischargeable) or a portion of the property division (and thereby dischargeable). Although from the Findings of Fact and Conclusions of Law Nos. 10, 11 and 12 contained in the Third Amended Decree of Dissolution (page A47, Petition for Writ of Certiorari) it could be argued that the Bankruptcy Court misread the Arizona

Court's intentions, the fact remains, a discharge was granted. Respondent nor the Arizona Courts do not challenge such ruling but rather give it the Full Faith and Credit as required by law. In the trial Court's ruling, specific mention was given to the fact that Respondent **may not** attempt to collect any missed payments from the discharged promissory note.

C. ARIZONA COURTS RETAIN JURISDICTION

Petitioner concedes that the Arizona trial court retained jurisdiction over the subject matter of the dissolution of the parties, Arizona Revised Statutes Section 25-327, but claims such jurisdiction is limited somehow by the Bankruptcy Court's dischargeability decision as to the $75,000.00 unsecured promissory note.

In Petitioner's Opening Brief to the Arizona Court of Appeals, a citation was made to the Uniformed Services Former Spouses Protection Act, 10 U.S.C. Sec. 1408(c)(1) and the following quotes were made:

> " . . . Appellee's [Petitioner herein] discharge in bankruptcy has not entirely divested [Respondent] of her share of the community property interest in [Petitioner's] retirement benefits, but has only altered the timing of the receipt of those benefits and modified the formula." (pages 8-9)
>
> " . . . A subsequent modification of a *final judgment* through an adjudicated discharge in bankruptcy cannot serve as a legal basis to reopen this judgment, particularly where such a bankruptcy discharge has not divested [Respondent] of her community property interest in JOE's

> retirement benefits, but only altered the timing of her receipt of those benefits." (page 12)

It is clear that on one hand, Petitioner must recognize the power granted to the State Courts through Federal Statute to apply that state's community property laws to federal retired pay [10 U.S.C. 1408 (c)(1)] but on the other hand, he argues that the state's power is restricted by the *bankruptcy court's modification* of the state dissolution decree. If taken to its logical conclusion, Petitioner's position is that the U.S. Bankruptcy Court for the Northern District of Texas has the subject matter jurisdiction to amend the parties' Arizona Decree of Dissolution and at the same time, the power to prevent the Arizona Court from exercising its reserved statutory jurisdiction to modify property settlements. Such reasoning is not based in the law or fact.

The Arizona trial court gave full faith and credit to the bankruptcy court's decision and specifically held that such discharge of *that* particular debt was correct and pursuant to law as reasoned by the Bankruptcy Court. (Findings of Fact and Conclusion of Law). Nonetheless, the equitable reasons to allow the reopening of the previous decree existed pursuant to Rule 60(c)(6), Arizona Rules of Civil Procedure and A.R.S. Section 25-327(A) and based on Respondent's "dire financial condition" as found by both the Bankruptcy Court and the Arizona trial court. Such finding mandated a modification of the decree to award Respondent directly her community property interest in the retirement programs.

Arizona law regarding reopening of property settlements is primarily intended to allow relief from judgments that, although perhaps legally faultless, are unjust because of extraordinary circumstances that cannot be remedied by legal review. *Tippit v. Lahr*, 132 Ariz. 406, 408-9, 646 P.2d 291 (App. 1982) The trial court specifically found that Petitioner's unilateral and voluntary action justified the relief sought by Respondent (page A-52, Petition for Writ of Certiorari, No. 15)

D. BANKRUPTCY COURT'S DECISION HAS NO BEARING ON DIVISION OF COMMUNITY PROPERTY

It is clear that postpetition obligations of Petitioner are not affected by his discharge in bankruptcy. See, *In Re Hanna*, 872 F.2d 829 (8th Cir. 1989) (Postpetition interest on unpaid federal and state taxes are not dischargeable).

Although Petitioner has cited three bankruptcy decisions, all from states which do not recognize community property rights of spouses, for the proposition that Respondent's interest in the retirement programs cannot be awarded, he has failed to provide the majority view from states where community property rights are protected by law.

The Ninth Circuit Court of Appeals held in *In Re Teichman*, 774 F.2d 1395 (1985) that postpetition payments of retirement benefits to an ex-spouse were not "debts" and thus not subject to discharge. Mr. Teichman argued, just as Petitioner is in the present case, that his obligation to pay retirement benefits was created in the property

settlement and therefore the ***entire*** obligation was prepetition debt. The court rejected such argument and clearly stated that the ex-spouse had an ownership interest in the retirement fund by reason of the divorce proceedings and therefore debtor's postpetition obligations are ***not*** debts under the Bankruptcy Code, *Id.* at 1398.

The court did go on to find no trust had been established for prepetition payments withheld by the debtor and not paid to his ex-spouse when due, and therefore granted a discharge as to those specific payments.

In the present case, no attempt has been made by Respondent to collect prepetition payments due under the Third Amended Decree, Nunc Pro Tunc. The entire focus of Respondent's efforts have been to establish her right, with the payors of Petitioner's federal retirement programs, to receive her community property share of each monthly payment. Petitioner has responded by taking every possible appeal route, including the present Writ to ensure a substantial delay in the proper division of the retirement benefits.

The Eighth Circuit Court of Appeals in *Bush v. Taylor*, 912 F.2d 989 (8th Cir. 1990), although citing *Teichman*, supra, went one step further in finding a constructive trust relationship and thus both prepetition and postpetition payments owed to the former spouse by debtor were not discharged in bankruptcy. *Id.* at 993 The court went so far as to say,

> "Taylor's obligation, Bush concedes, was not for alimony, maintenance, or support. At the same time, we have difficulty viewing it as a property settlement within the meaning of the Code,

> since in reality it appears to have been nothing more than a division of property required by the law of community property that obtains in the State of Washington" *Id.* at 993.

The *Bush* court cited both the Employee Retirement Income Security Act (ERISA) 29 U.S.C. Sections 988 and 1056(d)(1) and the Uniformed Services Former Spouses Protection Act of 1982, 10 U.S.C. Section 1408 as examples of Congress' intent not to allow a debtor, such as Petitioner herein, to use the Bankruptcy Code to strip ex-spouses of community property, citing *Mackey v. Lanier Collections Agency & Serv.*, 486 U.S. 825, 838, 108 S.Ct. 2182, 2190, 100 L.Ed.2d 836 (1988) (" . . . to guarantee that the Nation's private retirement income system provided fair treatment for women.") and *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 110 S.Ct. 680, 687 (1990) [FN 18, "importance of protecting a stream of income for pensioners"].

The court emphatically stated,

> "We doubt that Congress ever intended that a former wife's judicially decreed sole and separate property interest in a pension payable to her former husband should be subservient to the Bankruptcy Code's goal of giving the debtor a fresh start." *Id.* at 994

It is of interest to note that if the current Third Amended Decree, Nunc Pro Tunc, was now submitted to the Circuit Court of Appeals for the Bankruptcy Court herein (5th Circuit), that court would find that debtor could not discharge in a Chapter 7 case that portion of the monthly retirement benefits awarded to his ex-wife. *In Re Chandler*, 805 F.2d 555, 557 (1986)

In retrospect, the simple solution to this entire matter would have been for the original court to simply divide the retirement benefit as it did in the Nunc Pro Tunc Decree, as requested by the Respondent in 1987. Respondent has done everything in her power to pursue her statutory rights to retirement benefits. In fairness to the trial court, the status of the law in Arizona in 1987 as to the division of retirement was in great flux. Now settled, a majority of retirement benefits are divided just as Respondent's current Third Amended Decree provide. The issue of prepetition versus postpetition payments owed to Respondent has not been litigated and is therefore not ripe for ***any*** judicial review.

In courts which have considered the issue, it is clearly the majority view that Respondent's interest in the retirement programs cannot be divested through Petitioner's Chapter 7 bankruptcy. *In Re Drennan*, 161 B.R. 661 (Bankr. E.D. Ark. 1993); *In re Potter*, 159 B.R. 672 (Bankr. N.D. N.Y. 1993); and *In re Wilson*, 158 B.R. 709 (Bankr. S.D. Ohio 1993); *In Re Sommerville*, 122 B.R. 446 (Bankr. M.D. Ala. 1990); *Matter of Newcomb*, 151 B.R. 287 (Bankr. M.D. Fla. 1993); *Matter of Sadowski*, 144 B.R. 566 (Bankr. M.D. Ga. 1992); *In Re Long*, 148 B.R. 904 (Bankr. W.D. Mo. 1992); *In Re Fristoe*, 151 B.R. 81 (Bankr. W.D. Va. 1993); *In re Zrubek*, 149 B.R. 631 (Bankr. D. Mont. 1993).

CONCLUSION

For all the reasons previously stated, this case presents no issue appropriate for the exercise of this court's jurisdiction. Accordingly, the Petition for Writ of Certiorari should be denied.

ELLEDGE & IRWIN, P.C.
CHARLES A. IRWIN
Attorney of Record
For Respondent

APPENDIX

10 U.S.C. SEC. 1408(a) through (c) (UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT)

§ 1408. Payment of retired or retainer pay in compliance with court orders

(a) Definitions. – In this section:

(1) The term "Court" means –

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which –

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for –

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeal under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such members retired pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 1331 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

(b) **Effective service of process.** – For the purposes of this section –

(1) service of a court order is effective if

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (i) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) The court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) Authority for court to treat retired pay as property of the member and spouse. –

(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a decree of divorce, dissolution, annulment, or

legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.